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No.

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1988

NAAMAN E. KING and MARIAN KING,

Petitioners,

vs.

HILTON-DAVIS, a/k/a HILTON-DAVIS CHEMICAL CO., a Division of Sterling Drug, Inc.,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTION PRESENTED FOR REVIEW

Where recovery is available in tort for damage to "other property," must the trier of fact determine as a threshold issue whether the defendant's product is a component part of the damaged property and thus "the product itself" so as to bar recovery, or "other property," which remains unchanged by the law announced in *East River S.S. Corp. v. Transamerica Delaval, Inc.*, 476 U.S. 858, 106 S. Ct. 2295, 90 L. Ed. 2d 865 (1986)?

PARTIES TO THE ACTION

In the United States Court of Appeals for the Third Circuit, the appellant was Hilton-Davis, a/k/a Hilton-Davis Chemical Company, a Division of Sterling Drug, Inc. Appellees in the Court of Appeals were Naaman E. King and Marian King, petitioners herein.

Judgment notwithstanding the verdict was granted in favor of Washburn Potato Company by the United States District Court, and the action against Frank S. Kearney, Sr. and Frank S. Kearney, Sr. & Sons was dismissed for lack of personal jurisdiction. Neither of these rulings were appealed to the Third Circuit.

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No.

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October Term, 1988

NAAMAN E. KING and MARIAN KING,

Petitioners.

vs.

HILTON-DAVIS, a/k/a HILTON-DAVIS CHEMICAL CO., a Division of Sterling Drug, Inc.,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

OPINIONS BELOW

The decision of the United States Court of Appeals for the Third Circuit in *Naaman E. King and Marian King v. Hilton-Davis, a/k/a Hilton-Davis Chemical Company, a Division of Sterling Drug. Inc., a Hilton-Davis Group* is reported at 855 F.2d 1047 (3d Cir. 1988). The orders of the United States District Court for the Eastern District of Pennsylvania denying the post-trial

motions and entering judgment are unreported. The decision and orders are included in the appendix.

STATEMENT OF JURISDICTION

The United States Court of Appeals denied the petition for rehearing and suggestions for rehearing en banc on September 19, 1988. The petition for rehearing was filed on September 6, 1988, fourteen (14) days after the Third Circuit's decision of August 23, 1988.

This Court's jurisdiction is based upon 28 U.S.C. § 2101(c) as this is a petition for a writ of certiorari intended to bring before the Court a judgment in a civil action rendered by the United States Court of Appeals for the Third Circuit.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Amendment X to the Constitution of the United States which provides:

> The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

The Rules of Decision Act of 1789 codified at 28 U.S.C. § 1652 which provides:

> The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply.

STATEMENT OF THE CASE

This civil diversity action was commenced by Naaman and Marian King, Pennsylvania residents and potato farmers. The defendants were Hilton-Davis, a division of Sterling Drug, Inc., the manufacturer of a chemical used for suppression of sprouting in potatoes, and Washburn Potato Company, supplier of seed potatoes.[1] The Kings contracted in the fall of 1982 to buy seed potatoes through a broker, taking delivery in the spring. Since suppression can be achieved by non-chemical means, including temperature control, not all seed potatoes are chemically treated. However, some of those ultimately delivered to the Kings were treated by the grower with the chemical Fusarex, to prevent sprouting while in storage after the fall harvest. The process is not entirely understood: application of the product by sprinkling causes a gas to form, which extends indefinitely the natural post-harvest dormant state. The Kings did not know of the treatment; nor at the time of contracting had the potato broker identified the source of the potatoes to be supplied to the Kings. Further, the Kings were never warned that to break dormancy before planting, Fusarex-treated seed potatoes must be vigorously ventilated to ensure volatilization of the chemical to negate or remove the suppressant effect. They followed their customary standard agricultural procedures for planting their potatoes, and only the Fusarex-treated seeds failed to emerge.

The suit by the Kings alleged that Hilton-Davis' negligence, strict products liability and breach of warranty in the sale and manufacture of the chemical were the cause of damage to the seed potatoes, resulting in their failure to sprout and produce. At trial, the Kings proceeded on the negligence and products liability theories, that Hilton-Davis had a duty to warn them of

---

1. The supplier was granted judgment notwithstanding the verdict by the United States District Court, and is not a party to these appeals.

the necessity for special ventilation to break the dormancy of treated seed. The jury found in favor of the Kings on both counts. The damages were uncontested, and judgment was entered in accordance with the verdict.

Hilton-Davis' post-trial motions were denied. It then prosecuted a timely appeal to the United States Court of Appeals for the Third Circuit, raising the issue of whether the District Court had misapplied the decisions of this Court in *East River S.S. Corp. v. Transamerica Delaval, Inc.*, 476 U.S. 858, 106 S. Ct. 2295, 90 L. Ed. 2d 865 (1986), followed by the Third Circuit in *Aloe Coal Co. v. Clark Equipment Co.*, 816 F.2d 110. *cert. denied*, ____ U.S. ____, 108 S. Ct. 156, 98 L. Ed. 2d 111 (1987). The Court of Appeals held that the Kings had purchased an integrated product which had damaged "itself," and accordingly, reversed and remanded for entry of judgment notwithstanding the verdict.

REASONS FOR GRANTING THE WRIT

The Court of Appeals for the Third Circuit has predicted that the Pennsylvania courts would adopt the principles enunciated by this Honorable Court in *East River S.S. Corp. v. Transamerica Delaval, Inc.*, 476 U.S. 858, 106 S. Ct. 2295, 90 L. Ed. 2d 865 (1986), barring recovery in tort for economic losses which result from damage or injuries caused by a product to itself. The underlying considerations with respect to private risk allocation and public policy in warranty and tort law have been enunciated in detail.

Ignored by the Third Circuit, however, is the fact the *East River* did not change existing law. Recovery in tort continues to be available for injury done to property, as well as for personal injury. The opinion of this Court in *East River* expressly makes this point:

> Products liability grew out of a public policy judgment that people need more protection from dangerous products than is afforded by the law of warranty . . . . It is clear, however, that if this development were to progress too far, contract law would drown in a sea of tort . . . .
>
> The paradigmatic products-liability action is one where a product "reasonably certain to place life and limb in peril . . . ." causes bodily injury . . . .
>
> For similar reasons of safety, the manufacturer's duty of care was broadened to include protection against property damage . . . . Such damage is considered so akin to personal injury that the two are treated alike . . . .

(Appendix A at 7a). What this Court has done is to restrict, or limit, the category of property loss recoverable in tort. The litmus test is whether the defective property injures "itself" or "other" property.

The test is simply stated. The application of the test is of exceptional significance in its ramifications. Where the rule of *East River* is applicable, the remedies available to an injured party are drastically limited. Analysis of the nature of the subject property thus assumes an entirely new importance. Since tort relief may still be had for damage to certain types of property, a catch-all approach toward "property," as was done below, is seriously misleading and legally erroneous. Direction from this Court is essential, if parties are to be able to make the calculated commercial bargains contemplated by *East River*.

To date, no federal appellate court of any circuit has yet squarely addressed this specific problem. Petitioners respectfully urge that certiorari be granted by this Honorable Court, to fill this void, to clarify the proper analysis for determining what property is included, and what does not fall, within the purview of tort law. Lacking such direction, the error of indiscriminate rejection of tort claims arising from property damage will confuse and distort the orderly development of the law announced by this Court. While the holding in *East River*, is, of course, federal common law, the clear movement within the states and the federal circuits, predicting state law, has been its adoption.[2]

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2. In addition to cases cited below involving defective machines or their component parts, *East River* was approved by the Supreme Court of Minnesota in an action alleging defective design, *Valley Farmers' Elevator v. Linday Bros. Co.*, 398 N.W. 2d 553 (1987); similarly, for defective design, in the Sixth Circuit, *Cincinnati Gas & Electric Co. v. General Electric Co.*, 656 F. Supp. 49 (S.D. Ohio 1986); by the Supreme Court of Illinois in *Anderson Electric, Inc. v.*

(Cont'd)

The reported decisions have involved products such as pumps, *Richard O'Brien Companies v. Challenge-Cook Bros., Inc.*, 672 F. Supp. 466 (D. Colo. 1987); airplane, *Held v. Mitsubishi Aircraft International, Inc.*, 672 F. Supp. 369 (D. Minn. 1987); heating-coil-equipped tank barges, *Ingram River Equipment, Inc. v. Pott Industries, Inc.*, 816 F.2d 1231 (8th Cir. 1987); silos, *Frey Dairy v. A.O. Smith Harvestore Products, Inc.*, 680 F. Supp. 253 (E.D. Mich. 1988); anchor bolts in a nuclear reactor support system, *Consumers Power Co. v. Mississippi Valley Structural Steel Co.*, 636 F. Supp. (E.D. Mich. 1986); steam generators, *Florida Power & Light Co. v. Westinghouse Electric Corp.*, ____ Fla. ____, 510 So. 2d 899 (1987) (on certified questions from the 11th Circuit); high voltage bushing in transformer, *Wisconsin Power & Light Co. v. Westinghouse Electric Corp.*, 645 F. Supp. 1129 (W.D. Wis. 1986); engine parts, *Gulf Boat Marine Services, Inc. v. George Engine Co.*, 659 F. Supp. 7 (E.D. La. 1986); defective tow pads, *Ziddell, Inc. v. Cargo of Barge 2PC*, 661 F. Supp. 963 (W.D. Wash. 1987). In *City of Greenville v. W.R. Grace & Co.*, 827 F.2d 975 (4th Cir. 1987), the Fourth Circuit held that the manufacturer of a fireproofing product containing asbestos could be sued in tort, because the asbestos fibers in the product had contaminated the building in which it was installed. Since the Court of Appeals apparently considered it likely that personal injury

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Ledbetter Erection Corp., 115 Ill. 2d 146, 503 N.E. 2d 246 (1986), where recovery was sought for negligent performance of duty to inspect; in the Eleventh Circuit, *Streiff Jewelry Co. v. United Parcel Service, Inc.*, 670 F. Supp. 341 (S.D. Fla. 1987), barring losses sustained because of a counterfeit cashier's check; by the District Court for the Fourth Circuit in *Flow Industries v. Fields*, 683 F. Supp. 530 (D. Md. 1988), late delivery of pump motors, and *Wood Products, Inc. v. CMI*, 651 F. Supp. 648 (D. Md. 1986), negligent misrepresentation. The sole exception is the Ninth Circuit, which characterized *East River* as "persuasive," but felt constrained to follow then-existing Oregon law to the contrary. *Bancorp Leasing & Financial Corp. v. Augusta Aviation Corp.*, 813 F.2d 272 (1987) (defective landing gear).

would eventually result from the toxic substance, its holding did not require analysis of the product. An Indiana action was brought for crop losses sustained when a pesticide, applied by helicopter to the plaintiff's growing crop in the field, failed to perform its intended function of controlling a particular insect. *Prairie Production, Inc. v. Agchem-Division-Pennwalt Corp.*, ____ Ind. ____, 514 N.E. 2d 1299 (1987).

Significantly, with the exception of *City of Greenville* and *Prairie Production*, the decided product cases since and including *East River*, have all involved machines. The precise question raised by this appeal was thus not before the courts, which could in fairly straightforward fashion conclude that the property at issue injured "itself." *City of Greenville*, by contrast, concerned a non-mechanical product more akin to the chemical at issue here. There, the building into which asbestos fibers (in the fireproofing product) were introduced was deemed to be "other" property. It is instructive that the Fourth Circuit considered the effect of the product, not merely whether it could or did perform the fireproofing function — fulfilling the commercial expectation — for which it had been purchased by the plaintiff-City.[3]

The nature of a machine as product may present little difficulty in categorizing as "itself" or "other" for product liability purposes. Technological sophistication, manufacturing innovation, coupled with the burgeoning chemical industry's ingenuity, however, create "products" which do not correspond to the traditional classifications. The Supreme Court had no occasion to address the issue in *East River*. Petitioners respectfully urge that the non-mechanistic "property" in this case present an important opportunity for the Court to review its tort/warranty

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3. The failure of the pesticide in *Prairie Production* to meet the buyer's clear commercial expectations falls squarely within *East River*, and did not raise the issue of the nature of the property.

dichotomy in light of contemporary commercial, scientific and manufacturing realities.

Here, an agricultural product — seed potatoes — were treated at one point midway in the distributive chain with a chemical, Fusarex. The District Court below carefully undertook the analytic task, considering whether under all the facts the chemical Fusarex is a distinct product in itself, or merely a component part of a whole. It noted the fundamental distinction between parts of gas turbine engines at issue in *East River* and the Fusarex-treated seed potatoes. The lower court articulated factors to be taken into account, including the interrelationship between part and whole, degree of integration, the purpose or function of the chemical. The Third Circuit, while touching on the issue, misconstrued the analytic task, instead summarily concluding that the source of injury and the product were one and the same.

Conspicuously absent from the Court of Appeals' opinion was any discussion of the function of Fusarex: namely, to act upon the seed potato. This contrasts starkly to the function of component parts which together create an integrated whole. The chemical is active, and ultimately must be volitized so that the potato may produce as expected.

The court below failed to recognize the product for which the Kings actually bargained in this case. They contracted to purchase seed potatoes. The chemical was irrelevant to their negotiation, since it exclusively benefits the potato grower by suppressing sprouting until sale and delivery.[4] The record amply demonstrates that it is the grower who must maintain dormancy during the winter, and may do so in a variety of ways, both chemically and naturally. Application of Fusarex is thus inherently

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4. *Prairie Production* is thus distinguishable. The plaintiff purchased the pesticide for its own express uses and purposes.

different from treatments which may benefit the Kings by producing what the Third Circuit opinion described as "a disease-free, pest-free seed potato." (Appendix A at 12a). The product which the Kings received was supposed to be in condition to plant. A seed potato which continued to be affected by Fusarex would, in fact, not sprout at all, completely defeating the commercial expectations of the farmer-buyer, as the Kings' experience so dramatically illustrates. Logically, a product which, although benefiting for a particular purpose of one party in the distributive chain, injures or harms the ability of another product to perform for its ultimate user or consumer cannot be transformed into a component part of the latter by mere physical proximity.

The Court of Appeals described the Kings' bargain as one for an "integrated product," because "[l]ike many agricultural products, seed potatoes may be treated with a multitude of chemicals for a multitude of purposes: the end result of this treatment is intended to be a single product." (Appendix A at 12a). There is simply no evidentiary support of record for this analysis. The testimony showed only that the seed potatoes were treated by Mr. King himself at the time of planting with a fungicide and an insecticide, and that he was familiar with a treatment to prevent decay. The Court of Appeals erroneously took a series of quantum leaps: first, in making the factual finding, in the absence of evidence, that these seed potatoes had been treated in various ways; secondly, in concluding that a treated seed potato becomes an integrated product; and thirdly, in failing to distinguish the nature and purpose of Fusarex as solely a sprout suppressant for the grower, unrelated in any way to the bargained-for expectations of the Kings in a crop of potatoes from the seeds. Even assuming the seed potatoes were treated, treatments relating to the ability of the product to produce healthy plants would be reflected in the contractual dealings of the parties. For example, a treatment might make the seed potato less susceptible to disease. If the Kings chose to purchase a less expensive untreated seed,

they clearly would be taking the calculated risk of a less productive or failed crop. This is the relevant bargain, and under *East River*, the Kings' remedy to recoup the benefit of the bargain lies in warranty in the event of loss. But how the seeds had been kept dormant by the grower prior to purchase, whether chemically or otherwise, is irrelevant, just as is the method of the grower's planting and the make and model of his equipment.

Fundamentally, what *East River* has done is to create a threshold factual issue: that is, whether the defective product is a component part of the damaged product. The Court of Appeals framed as a threshold issue, whether the pertinent product is that sold by the defendant or purchased by the plaintiff (Appendix A at 9a).[5] Petitioners urge that the analysis was in error, that it failed to properly interpret the Supreme Court's holding. The Court should grant this writ, to define as the critical question, not whose product is considered, but whether the seller's product is a component part of the buyer's purchase, and thus, ultimately, the "product itself."

Where the answer is so clear that reasonable minds cannot differ, such a finding would be made by the court as a matter of law. *See, e.g., Verge v. Ford Motor Co.*, 581 F.2d 384 (3d Cir. 1978); *Galloway v. United States*, 319 U.S. 372, 63 S. Ct. 1077, 87 L. Ed. 1458 (1943); 9 *Wright & Miller*, Civil § 2524

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5. The Fifth Circuit utilized a "package" test in *Shipco 2295, Inc. v. Avondale Shipyards, Inc.*, 825 F.2d 925 (1987), which considered an issue not decided in *East River* but its natural extension. In *Shipco*, unlike *East River*, the ship in which the defective product was installed was also damaged. The plaintiffs' claim that the vessel itself represented "other" property was rejected by the Court of Appeals, which ruled that it had purchased the ship and the Steering Mechanism as a "package." Thus, the only loss was to the "product itself." Petitioners suggest that this test is too vague to adequately address the interests at stake presented by this petition, beyond the relatively simple facts of *Shipco*.

(1971). But where debatable, resolution of the disputed fact is a matter for a jury to decide, on all the evidence. *Fireman's Fund Insurance Corp. v. Videfreeze Corp.*, 540 F.2d 1171 (3rd Cir. 1976), *cert. denied*, 429 U.S. 1053, 97 S. Ct. 767, 50 L. Ed. 2d 770. In the instant matter, on appeal, the Court of Appeals erred in ordering entry of judgment notwithstanding the verdict. Instead, the case should properly be remanded for a finding of fact, made in accordance with the product analysis developed by this Court, to determine whether or not a defective product is a component part of a damaged product, thereby defining the buyer's available remedies in tort or warranty under *East River S.S. Corp. v. Transamerica Delaval, Inc.* and its progeny.

CONCLUSION

The Third Circuit decision fails to properly analyze the nature of property for purposes of applying the law announced in *East River*, and further errs in usurping the factfinding function on appeal. Petitioners respectfully request that this Honorable Court grant this petition under Supreme Court Rule 17.1(c) as an important question of law that has not been, but should be, decided by this Honorable Court. Although numerous jurisdictions have adopted the federal common law rule of *East River*, barring tort recovery for damage to property which injures "itself," no federal court of appeals or state court has developed a viable analytic framework to distinguish "property itself" and "other property" for the commercially reasonable application of *East River*. Petitioners urge that the orderly development of the law requires that such formulation by this Court and that the Third Circuit be directed to reverse its judgment in favor of Hilton-Davis.

Respectfully submitted,

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APPENDIX A—OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT, *NAAMAN E. KING AND MARIAN KING V. HILTON-DAVIS*, NO. 87-1716, AUGUST 23, 1988

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 87-1716

KING, NAAMAN E. and KING, MARIAN

vs.

HILTON-DAVIS, a/k/a HILTON-DAVIS CHEMICAL COMPANY, a Division of STERLING DRUG, INC.; TERWIN CHEMICALS, INC.; HILTON-DAVIS GROUP and WASHBURN POTATO COMPANY and KEARNEY, FRANK S. SR.
FRANK S. KEARNEY, SR. & SONS

Hilton-Davis,
Appellant

Appeal from the United States District Court for the Eastern District of Pennsylvania
(Civil Action No. 85-0877)

Argued May 2, 1988

Before: HIGGINBOTHAM, STAPLETON, and GREENBERG, *Circuit Judges*

(Opinion Filed August 23, 1988)

Appendix A

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OPINION OF THE COURT

STAPLETON, *Circuit Judge*.

This diversity action brings before us once again the problem of ascertaining the boundary between tort and contract. We find that the plaintiffs' product liability claims were for economic loss resulting from injury only to the product itself, and accordingly conclude that the principles of *East River Steamship Corp. v. Transamerica Delaval, Inc.*, 476 U.S. 858 (1986), which we predicted in *Aloe Coal Co. v. Clark Equipment Co.*, 816 F.2d 110 (3d Cir.), *cert. denied* 108 S. Ct. 156 (1987), would be adopted by the Pennsylvania courts, require reversal of the district court's denial of defendant-appellant Hilton-Davis' motion for judgment N.O.V.

Appendix A

I.

Naaman and Marion King are Pennsylvania farmers who run a roughly 600-acre farming operation producing, among other things, potatoes. They have been in the farming business for about 36 years. A large part of the Kings' 1983 potato crop failed; they attributed this to the fact that the bulk of the seed potatoes they had purchased that spring had been treated with a chemical by the name of Fusarex. The Kings sued Hilton-Davis, the manufacturer of Fusarex, in tort, alleging that Hilton-Davis failed to warn the Kings properly about Fusarex and that this failure to warn was not only negligent but rendered the company strictly liable as well. The jury found in favor of the Kings on both the negligence and strict liability counts. On appeal, Hilton-Davis raises a variety of challenges to the jury's verdict. We address only Hilton-Davis' argument that the character of the Kings' loss is such that no recovery for it in tort is possible under Pennsylvania law.

Seed potatoes are harvested in fall and stored over the winter, then cut up and planted in the spring. Stored seed potatoes should not be allowed to sprout; they will generally remain dormant naturally, putting out no sprouts, if kept at certain constant, relatively low temperatures. To ensure dormancy, seed potatoes may be treated with a sprout suppressant.

Fusarex is a sprout suppressant which has been in use in the United States since the 1950s. It is a tan, clay-based powder, 94% inert and 6% active, which is applied to seed (or other) potatoes as they are put into storage. After the Fusarex powder is put on the potatoes, its active element slowly forms a gas which surrounds the potatoes. It is this gas which inhibits sprouting, though just how it does so is not known. Come spring, the seed potatoes are removed from

storage, cut up, and planted. If the remaining Fusarex is not to some extent -- precisely how much is also not known -- removed from the seed potatoes before planting, sprouting may continue to be inhibited, so that the planted seed potatoes may not sprout at all or may not grow well if they do sprout. The remaining Fusarex is removed by ventilation.

In fall of 1982, the Kings contracted with Washburn Potato Company, a potato dealer located in Maine, to buy Katahdin seed potatoes for the 1983 season. As was its usual practice, Washburn had at that time not yet made any arrangement concerning who would actually supply the seed potatoes to be sold to the Kings, instead waiting to see which supplier would have a good-quality crop of the desired potato variety available in early 1983. Some of Washburn's suppliers treated their seed potatoes with Fusarex, and others did not. In general, between 70% and 75% of seed potato growers use Fusarex on some part of their crops. The Maine grower who eventually supplied the Kings' seed potatoes, Mr. Kearney, had treated his potatoes with Fusarex before putting them into storage in the fall of 1982. Kearney bought the Fusarex he used from Hilton-Davis.

The rate of application recommended for Fusarex by Hilton-Davis is one pound of the chemical per 600 pounds of potatoes. This application rate results in a whole-potato concentration of 100 parts per million. The EPA allows a whole-potato Fusarex concentration of 25 ppm in food. Because Kearney had in prior years obtained proper sprout suppression using considerably less Fusarex than recommended by the manufacturer, in fall of 1982 he applied to his seed potatoes only three pounds of Fusarex per 14,000 pounds of potatoes. This resulted in a whole-potato concentration of 15 ppm at the time the Kings bought the seed potatoes. The parties stipulated that at the

time of planting, the seed potatoes had a whole-potato concentration of .71 ppm of Fusarex, and a peel concentration of between 4.8 and 6.8 ppm.

At the time he collected his seed potatoes from Kearney, Mr. King was provided by Kearney with a state certificate of inspection upon which was noted the fact that the potatoes had been treated with Fusarex. King testified that he was not familiar with Fusarex at that time and assumed that its sole purpose was to prevent rot. Conflicting evidence was presented at trial as to whether Kearney and King discussed Fusarex and whether Kearney gave King a Fusarex bag complete with label.

The Kings annually devote about 150 acres of their land to potatoes; between April 27th and May 4th of 1983, they planted about 96 of these acres with the Fusarex-treated seed potatoes bought from Washburn and supplied to Washburn by Kearney. Two-thirds of this planting completely failed to sprout, and the third that did sprout ultimately gave a very poor yield.

The Kings brought suit against Hilton-Davis, Washburn, and Kearney over this crop failure. The Kings sued Hilton-Davis and Washburn both in tort, based on theories of strict liability and negligence, and in contract, based on breach of warranty. The suit against Kearney was dismissed for lack of personal jurisdiction. The action against Hilton-Davis and Washburn went to trial, and the jury returned a verdict in favor of the Kings against both defendants. The jury found Hilton-Davis 85% negligent and strictly liable; it found Washburn 15% negligent, but not liable for breach of warranty. The breach of warranty claim against Hilton-Davis was not submitted to the jury and the Kings did not object to this omission.

Both defendants moved for judgment N.O.V. or, in the alternative, a new trial. The district court granted Washburn's motion for judgment N.O.V. based on an

exculpatory clause in Washburn's contract with the Kings.[1] but sustained the jury verdict against Hilton-Davis. Because the only issue we address in this appeal is whether the Kings' recovery in tort is barred as a matter of Pennsylvania law, our review is plenary. *Aloe Coal*, 816 F.2d at 116.

II.

Our starting point is *East River Steamship Corp. v. Transamerica Delaval, Inc.*, 476 U.S. 858 (1986). In that case the Court, sitting in admiralty, unanimously held that "a manufacturer in a commercial relationship has no duty under either a negligence or strict products-liability theory to prevent a product from injuring itself." 476 U.S. at 871. In *Aloe Coal*, 816 F.2d at 118, this court predicted that the Pennsylvania Supreme Court would adopt the rationale and conclusions of *East River* to bar a purchaser's recovery in tort from his or her seller for economic loss.[2]

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1. The district court, in addition to concluding that the contract expressly waived negligence claims against Washburn and that such a provision was valid under Pennsylvania law, considered whether this contract was one of adhesion which should not be given effect. The reasons for the court's conclusion that this was not a contract of adhesion were that the Kings had a large operation and were sophisticated farmers; that there were numerous other dealers from whom the Kings could have bought seed potatoes, not all of whom had exculpatory clauses in their contracts; and that the Kings had in the past used other dealers besides Washburn when Washburn could not supply what they required. The Kings initially appealed from the judgment in favor of Washburn but subsequently withdrew that appeal.

2. In *Aloe Coal*, the purchaser of a tractor shovel sued the manufacturer alleging negligence, strict liability, and breach of warranty after the tractor shovel was destroyed in a fire the cause of which was not known. We held that the purchaser could not recover for the fire damage under product liability theory but was limited to remedies available for breach of warranty.

Appendix A

Because the reasoning of the Supreme Court in *East River* is crucial to determination of the correct result here, we quote at some length from that opinion. We begin with the Court's statements that:

> Products liability grew out of a public policy judgment that people need more protection from dangerous products than is afforded by the law of warranty. . . . It is clear, however, that if this development were to progress too far, contract law would drown in a sea of tort. . . .
>
> The paradigmatic products-liability action is one where a product "reasonably certain to place life and limb in peril. . . ." causes bodily injury. . . .
>
> For similar reasons of safety, the manufacturer's duty of care was broadened to include protection against property damage. . . . Such damage is considered so akin to personal injury that the two are treated alike. . . .
>
> In the traditional "property damage" cases, the defective product damages other property. In this case, there was no damage to "other" property. Rather, the first, second, and third counts allege that each supertanker's defectively designed turbine components damaged only the turbine itself. Since each turbine was supplied by Delaval as an integrated package, . . . each is properly regarded as a single unit. . . . Obviously, damage to a product itself has certain attributes of a products-liability claim. But the injury suffered -- the failure of the product to function properly -- is the essence of a warranty action, through which a contracting party can seek to recoup the benefit of its bargain.

476 U.S. at 866-68.

The Supreme Court went on to conclude that "[w]hen a product injures only itself the reasons for imposing a tort duty are weak and those for leaving the party to its contractual remedies are strong." 476 U.S. at 871. The Court gave four primary reasons for this conclusion. First, the "tort concern with safety is reduced" where no personal injury or property damage has occurred: the commercial user stands to lose only the benefit of its bargain. *Id.* Second, the maintenance of product value and quality is the traditional function of express and implied warranties and the law of such warranties "sufficiently protects the purchaser by allowing it to obtain the benefit of its bargain," thereby placing it in the same position it would have been in if the product had functioned properly. *Id.* at 873. Third, in this context, there is no justification for interference with private allocation of the risk of injury to the product itself. And, finally, it is more desirable and ultimately less expensive to have liability for injuries to a product itself limited by the principles applicable to warranty claims than to subject a manufacturer to tort damages of an indefinite amount: while warranty liability can be contractually disclaimed and is limited by the "requirements of foreseeability and of privity," tort liability is considerably more difficult to contractually circumscribe and is not limited by foreseeability and privity. *Id.* at 874.

With respect to the last of these points, the Supreme Court observed:

> A warranty action . . . has a built-in limitation on liability, whereas a tort action could subject the manufacturer to damages of an indefinite amount. The limitation in a contract action comes from the agreement of the parties and the requirement that consequential damages, such as lost profits, be a foreseeable result of the breach. . . . In a warranty action where the loss is purely economic, the

> limitation derives from the requirements of foreseeability and privity, which is still generally enforced for such claims in a commercial setting.
>
> . . .
>
> In products-liability law, where there is a duty to the public generally, foreseeability is an inadequate brake. . . . Permitting recovery for all foreseeable claims for purely economic loss could make a manufacturer liable for vast sums. It would be difficult for a manufacturer to take into account the expectations of persons downstream who may encounter its product.

Id.

The plaintiffs in *East River* were bareboat charterers of ships powered by the defective turbines manufactured by the defendant. They had chartered for 20-year terms from the vessel owners, which had purchased the vessels from the shipbuilding firm to which the defendant had supplied the turbines. Accordingly, in *East River*, as in this case, the plaintiffs and the defendants were remote in the production and distribution chain and the defendant sold something less than the plaintiffs leased or purchased. In *East River*, however, the only property damage caused by the defect was damage to the property supplied by the defendant to the shipbuilder, the turbines. Here the defect in the Fusarex sold by the defendant, after being applied by Kearney, rendered the seed potatoes less valuable as seed potatoes. As a result, this case presents a threshold issue that *East River* did not: In determining whether a product "injures only itself" for purposes of applying the *East River* rule in a context like this, does one look to the product sold by the defendant or to the product purchased by the plaintiff? We conclude that one must look to the product purchased by the plaintiff. We also

conclude that the district court, while it correctly looked to what the plaintiff purchased rather than to what Hilton-Davis sold, erred in finding that the seed potatoes constituted "other property" and, accordingly, that this was not a case involving only economic loss.

As we read *East River*, it is the character of the plaintiff's loss that determines the nature of the available remedies. When loss of the benefit of a bargain is the plaintiff's sole loss, the judgment of the Supreme Court was that the undesirable consequences of affording a tort remedy in addition to a contract-based recovery were sufficient to outweigh the limited interest of the plaintiff in having relief beyond that provided by warranty claims. The relevant bargain in this context is that struck by the plaintiff. It is that bargain that determines his or her economic loss and whether he or she has been injured beyond that loss. Moreover, the *East River* analysis dictates that where the purchaser of a defective product sues the manufacturer from whom he or she has purchased the product, rather than a supplier of components for the product, the relevant product is what the plaintiff bargained for and the remedy is limited to a contract-based recovery. We perceive no principled basis for affording the purchaser of a defective product greater relief against the manufacturer of a component part that has rendered a product defective than against the manufacturer of the assembled defective product. This counsels against looking to the component part to define the product and "economic loss." As the Court of Appeals for the Fifth Circuit recently observed:

> We see no rational reason to give the buyer greater rights to recover economic losses for a defect in the product because the component is designed, constructed, or furnished by someone other than the final manufacturer. The buyer ordinarily has no interest in how or where the

> manufacturer obtains individual components. The buyer is usually interested in the quality of the finished product, and is content to let the manufacturer decide whether to do all the work or delegate part of it to others.

825 F.2d at 929.

Our conclusion is supported by the federal appellate court decisions that have passed upon the tort liability of a component part manufacturer for economic loss. In *Shipco 2295, Inc. v. Avondale Shipyards, Inc.*, 825 F.2d 925 (5th Cir. 1987) (admiralty), for example, the court held that in the context of a tort claim for economic loss, the "product" means "the finished product bargained for by the buyer" rather than the individual components of that product. 825 F.2d at 930. The *Shipco* court therefore held that the plaintiff could maintain its tort claim for economic loss neither against the company which had supplied the contracted-for product nor against the company which had supplied the defective component of that product. The plaintiff's remedies were limited to a contract action against the company which had sold the plaintiff the finished, bargained-for product. Similarly, in *American Home Asssurance Co. v. Major Tool & Machine, Inc.*, 767 F.2d 446 (8th Cir. 1985) (applying Minnesota law), the court held that a turbine assembler could not recover in tort from manufacturers of defective component parts of the turbine on the theory that the defective components damaged "other property," i.e., the remainder of the turbine. In the court's view, "other property" would not include other parts of a single product fabricated under a series of subcontracts. And in *Air Lift Int'l, Inc. v. McDonnell Douglas Corp.*, 685 F.2d 267, 270 (9th Cir. 1982) (applying California law), the court dismissed product liability claims against the manufacturer of a component part of an airliner as well as against the

manufacturer of the airliner, on the ground that the allocation of risk contracted for by the purchaser and the airliner manufacturer would be nullified if the purchaser could recover from the component-part manufacturer. *See also County of Westchester v. General Motors Corp.*, 555 F. Supp. 290, 292 (S.D.N.Y. 1983) (applying New York law) (rejecting argument that damage to air conditioning condensers caused by defective design and redesign of air conditioning system constituted damage to other property that would support a tort claim against the designing corporation); *Cedars of Lebanon Hospital Corp. v. European X-Ray Distributors, Inc.*, 444 So.2d 1068, 1071-72 (Fla.App. 3d Dist. 1984) (applying Florida law) (affirming dismissal of tort claims for economic loss against component part manufacturer).

Focusing on the Kings' bargained-for expectations, we hold that the relevant product in this case "injured only itself." The Kings contracted to buy a single integrated product, seed potatoes. Like many agricultural products, seed potatoes may be treated with a multitude of chemicals for a multitude of purposes; the end result of this treatment is intended to be a single product -- in this case a disease-free, pest-free seed potato that is capable of producing healthy plants. The Kings lost the expected performance of the seed potatoes, no more and no less.[3]

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3. In defining "the product," the *Shipco* court reasoned:

> The completed vessels were obviously the objects of the contract. Shipco did not bargain separately for individual components of each vessel. We are persuaded that those same vessels that were the object of the contract must be considered "the product" rather than the individual components that make up the vessels.

825 F.2d at 928. We find this reasoning apposite here.

Appendix A

Although it is true, as the district court stressed, that application of Fusarex to ensure the dormancy of seed potatoes is not necessary, we do not think it appropriate to look to the necessity of including a particular part in a product in determining whether or not the part should be considered a separate product. The fact that Kearney might have opted not to use Fusarex on his potatoes does not lead to the conclusion that the Fusarex cannot form part of an integrated package of treated seed potatoes.[4]

Having concluded that the teachings of *East River* foreclose tort liability in the context of this case, the remaining issue is whether we believe the Supreme Court of Pennsylvania would accept those teachings in this context. In *Aloe Coal*, we predicted that the Supreme Court of Pennsylvania would decline to follow a course that would severely restrict the ability of

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Our conclusion on this point, and in this case generally, is contrary to that of the Supreme Court of Montana in *Streich v. Hilton-Davis*, 692 P.2d 440 (Montana 1984) (farmers able to recover in both tort and contract for crop failure found to have been caused by Fusarex). The *Streich* court did not have the benefit of the analysis of the Supreme Court in *East River*.

4. We also do not agree with the district court that the fact that the Fusarex and the seed potatoes were produced by separate entities in different locations is of significance. To have been produced under such circumstances does not make component parts any less capable of being integrated into the final product than if they had been made at the same location by the same entity that turns out that final product.

Nor are we impressed with the metaphysical argument advanced by the Kings at oral argument that the seed potatoes and the Fusarex were two separate products because the latter did not penetrate the former. In addition to being legally irrelevant, this contention is without factual foundation. It is factually indisputable that some Fusarex is absorbed by a potato to which the chemical is applied; the parties' stipulation here as to whole-potato and peel concentrations of Fusarex in the very seed potatoes bought and planted by the Kings makes that evident.

parties in commercial transactions to allocate the risk of purely economic losses and would leave a manufacturer with an open-ended and indefinite liability for such losses. The only factual difference between *Aloe Coal* and this case is that the plaintiff in *Aloe Coal* was attempting to recover economic loss from a manufacturer from whom it purchased directly, while the plaintiff here seeks to recover such loss from a component supplier who is remote from the plaintiff in the production and distribution chain. While we find a portion of the relevant Pennsylvania law uncertain, given the policy judgments we have predicted the Pennsylvania Supreme Court would adopt, we conclude that this factual distinction would not produce a different result.

We find Pennsylvania law unclear on the issue of whether a plaintiff who has suffered economic loss can recover for breach of a warranty of merchantability from a party with whom it is not in privity. The Supreme Court of Pennsylvania has suggested by way of dictum that a showing of privity may not be required. *Kassab v. Central Soya*, 246 A.2d 848, 854-55 n.7 (Pa. 1968). More recently, the Superior Court has held that lack of privity defeats a claim for economic loss under a theory of implied warranty. *Johnson v. General Motors Corp.*, 502 A.2d 1317, 1320 (Pa.Super. 1986) (warranty protection has not been extended to persons other than the buyer who do not sustain personal injury, and argument that such protection ought to be extended should be addressed to the legislature rather than the courts), *app. denied* 523 A.2d 346 (Pa. 1987). *See also Manor Junior College v. Kaller's, Inc.*, 507 A.2d 1245, 1249 (Pa.Super. 1986) (privity still required for common law breach of warranty claim). In these circumstances, we will make alternative assumptions about this issue in our analysis.

Appendix A

If the Pennsylvania Supreme Court ultimately holds that privity is not required for a breach of warranty recovery where only economic loss is involved, we would expect it to also hold that warranty liability to someone remote in the chain can be disclaimed or limited under the provisions of the U.C.C., without an express contract with the remote party, so long as the disclaimer or limitation is clearly communicated to the remote party prior to his or her purchase.[5] Under this set of assumptions, if a tort remedy is denied in accordance with *East River*, a remote purchaser in Pennsylvania will have a satisfactory alternative remedy against the manufacturer of the product or a component thereof. That warranty remedy, while not subject to the limitation of the privity doctrine, will remain limited by a foreseeability requirement and will be subject to limitation and disclaimer under the U.C.C.[6] Thus, if the *East River* rule is applied in this context, private risk allocation will be preserved and manufacturers of products or components thereof will not be exposed to open-ended and indefinite liability. If tort recovery is permitted, however, it will be impossible for such

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5. States that have dispensed with the requirement of privity in this context have typically held that a manufacturer can limit his warranty liability by a conspicuous provision in the literature included with the product, *e.g. Sanco, Inc. v. Ford Motor Co.*, 771 F.2d 1081, 1087 (7th Cir. 1985) (applying Indiana law), or by contracting with the dealer to include express reference for a limitation on the manufacturer's warranty liability in the dealer's contracts with its customers, *e.g. Hunter v. Texas Instruments, Inc.*, 798 F.2d 299, 302 (8th Cir. 1986) (applying Arkansas law). *See also Clark v. DeLaval Separator Corp.*, 639 F.2d 1320, 1324 (5th Cir. 1981) (under Texas law, manufacturer's disclaimer may be effective against remote purchaser where such disclaimer is included either with the product or in the contract to which the ultimate purchaser is a party).

6. U.C.C. §§ 2-316, 2-719.

manufacturers to control their exposure to liability for economic loss, and the economic consequences of indefinite exposure found undesirable in *East River* will follow.

Assuming that the Supreme Court of Pennsylvania ultimately holds privity to be an essential element of a warranty claim for economic loss, if tort liability is denied in accordance with *East River*, a purchaser in the position of the Kings will not have a satisfactory alternative remedy against a party in Hilton-Davis' position. There will, however, be a warranty claim against the immediate seller that, assuming the continuing financial responsibility of the seller, will give the purchaser the benefit of its bargain. This is precisely the situation that confronted the Supreme Court in *East River*. The Court there expressly noted that the charterers had no warranty claim against the turbine manufacturer and, as we have noted, affirmatively relied upon the "limitation of privity" when opting in favor of warranty as the exclusive remedy. Implicit in the *East River* decision is the policy judgment that in a commercial context the possibility of an inadequate recovery occasioned by bankruptcy, a commercial risk that a purchaser assumes in choosing a seller, does not justify permitting a tort recovery that will allow a purchaser to reach back up the production and distribution chain, thereby disrupting the risk allocations that have been worked out in the transactions comprising that chain.

Based upon the foregoing, we predict that the Supreme Court of Pennsylvania would apply the *East River* rule in this context as well as the situation before the Court in *Aloe Coal*.

III.

Because we conclude that the Supreme Court of Pennsylvania law would not permit recovery from a component part supplier under a negligence or strict

liability theory for economic loss resulting from a defective product damaging only itself. we cannot uphold the judgment entered in the district court against Hilton-Davis. We therefore reverse the denial of Hilton-Davis' motion for judgment N.O.V., and remand these proceedings to the district court so that it may enter N.O.V. for Hilton-Davis.

A True Copy:

Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

APPENDIX B—ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT, *NAAMAN E. KING AND MARIAN KING V. HILTON-DAVIS*, NO. 87-1716, SEPTEMBER 19, 1988

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

KING, NAAMAN E. and KING, MARIAN

vs.

HILTON-DAVIS, a/k/a HILTON-DAVIS CHEMICAL COMPANY, a Division of STERLING DRUG, INC.; TERWIN CHEMICALS, INC.; HILTON-DAVIS GROUP and WASHBURN POTATO COMPANY and KEARNEY, FRANK S. SR.
FRANK S. KEARNEY, SR. & SONS

Hilton-Davis,
Appellant

SUR PETITION FOR REHEARING

Before: GIBBONS, *Chief Judge*, SEITZ, HIGGINBOTHAM, SLOVITER, BECKER, STAPLETON, MANSMANN, GREENBERG, HUTCHINSON, SCIRICA, and COWEN, *Circuit Judges*

The petition for rehearing filed by Appellees in the above-entitled case having been submitted to the judges who participated in the decision of this Court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service

not having voted for rehearing by the court in banc, the petition for rehearing is denied.

BY THE COURT

s/ Walter K. Stapleton
Circuit Judge

Dated: September 19, 1988

APPENDIX C—MEMORANDUM AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA, *NAAMAN E. KING AND MARIAN KING V. HILTON-DAVIS*, CIVIL ACTION NO. 85-877, OCTOBER 26, 1987

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CIVIL ACTION NO. 85-877

NAAMAN E. KING and MARIAN KING

Plaintiffs

vs.

HILTON-DAVIS, a/k/a HILTON-DAVIS CHEMICAL COMPANY, etc., et al.

Defendant

MEMORANDUM AND ORDER

FULLAM, Ch.J. OCTOBER 26, 1987

Plaintiffs are potato-growers in Pennsylvania. After experiencing a disappointing crop in 1983, plaintiffs filed this lawsuit to recoup losses which they attributed to seed potatoes treated with a chemical sprout-suppressant known as Fusarex. Plaintiffs alleged that defendants Washburn Potato Company ("Washburn"), the Maine potato broker from whom plantiffs purchased the seed potatoes, and Hilton-Davis, a/k/a Hilton-Davis Chemical Company ("Hilton-Davis"), the manufacturer of Fusarex, failed to warn them that special ventilating procedures

were necessary to diffuse the chemical suppressant and allow the potatoes to grow properly. A jury returned a verdict for the plaintiffs, finding both Washburn Potato Company and Hilton-Davis negligent and, in addition, holding Hilton-Davis strictly liable for plaintiffs' losses. Asserting numerous points of error, the defendants have asked this court to enter a judgment n.o.v. or, alternatively, to order a new trial. Plaintiffs have forwarded their own post-trial motion asking that the jury verdict be molded and delay damages added pursuant to Pennsylvania Rule of Civil Procedure 238.[1]

In March 1983, Mr. King traveled to Maine to receive the seed potatoes purchased from Washburn. At some point prior to delivery, the potatoes had been treated with Fusarex so as to suppress sprouting during storage. After receiving delivery of the potatoes in Maine, Mr. King transported them to Pennsylvania and stored them in his own storage facility before the planting in May 1983. Of the 96 acres of seed potatoes that were planted, approximately two-thirds failed to take hold. The potatoes that did emerge produced a poor yield.

I.

Hilton-Davis objects that it cannot be held strictly liable in light of the type of injury which plaintiffs suffered.[2] Even though

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1. Because the trial in this case ended before the Pennsylvania Supreme Court handed down its decision in *Craig v. Magee Memorial Rehabilitation Center*, 512 Pa. 60, 515 A.2d 1350 (1986), which suspended Rule 238, but only prospectively, *id.* at 1353, *Craig* does not affect my disposition of this motion.

2. Although Hilton-Davis phrases this objection as if it bears only on the strict liability claim, it clearly bears on Hilton-Davis' negligence liability as well since the economic loss/property damage distinction relates to the boundary between tort and contract generally.

it contests this court's determination that Pennsylvania law governs in this case,[3] Hilton-Davis correctly points out that Pennsylvania law does not permit a person complaining of purely economic losses to recover in tort. In *Aloe Coal Co. Commercial Union Ins. Co. v. Clark Equipment Co.*, 816 F.2d 110 (1987), the Third Circuit revised its judgment about where Pennsylvania courts would draw the boundary between contract and tort. Abandoning the risk/injury inquiry of *Pennsylvania Glass Sand Corp. v. Caterpillar Tractor*, 652 F.2d 1165 (3d Cir. 1981) and *Industrial Uniform Rental Co. v. International Harvester Co.*, 317 Pa. Super. 65, 463 A.2d 1085 (1983), the Third Circuit held that Pennsylvania courts would limit plaintiffs to contract/warranty remedies in cases where the injury was to the product itself. *Aloe Coal Co.*, 816 F.2d at 117-19. According to that case, in order to prevail under the principles of either § 402A of the Restatement 2d Torts or negligence law, the plaintiff must show that he has incurred property damage or personal injury and not simply economic loss. *Id.*

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3. This court properly chose to apply Pennsylvania law to this matter. Among other relevant considerations, plaintiffs are domiciled in Pennsylvania and contacted Washburn from Pennsylvania when placing their order. Washburn sent the contract to Pennsylvania for plaintiff's signature and acceptance. Finally, the potatoes failed to sprout in Pennsylvania farmland.

The quality and not just the quantity of these contacts convinces this court that, in accordance with the conflict laws of Pennsylvania which this court is bound to apply, *Klaxon Co. v. Stentor Elevator Mfg. Co.*, 313 U.S. 487 (1941), Pennsylvania has the most significant relationship to this transaction. *Griffith v. United Airlines*, 416 Pa. 1, 203 A.2d 796 (1964). For this reason, Pennsylvania law governs both the contract and tort issues in this case. *Cf. Neville Chemical Co. v. Union Carbide Corp.*, 422 F.2d 1205 (1970); *Hammermill Paper Co. v. Pipe Systems, Inc.*, 581 F.Supp. 1189, 1194 (1984) (noting that the jurisdiction where the injury occurs has considerable interest in applying its products liability law).

Appendix C

Although the *Aloe Coal Co.* test may be considerably clearer than the *PGS* standard, the line between economic loss and property damage is not, by any means, sharp.[4] In particular, Hilton-Davis asserts that the failure of the seed potatoes to emerge constitutes a form of economic loss. Plaintiffs argue, on the other hand, that a defective product, the chemical Fusarex, did injure "other property," the seed potatoes, and hence that the injury is properly characterized as property damage.

For reasons set out below, I find the plaintiffs' characterization more compelling than Hilton-Davis' on the facts of this case. At the same time, I note, as other courts already have, that the plaintiffs' analysis should not be accepted lightly in the general run of products liability cases since it would entirely erase the distinction between tort and contract. *See East River Steamship Corp. v. Transamerica Delaval, Inc.*, 106 S.Ct. 2295, 2300 (1986); *Northern Power & Engineering Corp. v. Caterpillar Tractor Co.*, 623 P.2d 324, 330 (Alaska 1981). If uncabined, the logic upon which plaintiffs rely would permit plaintiffs in every case to manufacture property damage simply by parsing the product into component parts, specifying that the defect originated in a particular component, and suggesting that the damage to the rest of the product constitutes damage to "other property". *See East River* at 2300; *Northern Power & Engineering Co.* at 330.

Although Pennsylvania courts have not directly addressed this issue, other courts have opined about when they would accept a characterization which subdivides a product and treats component parts as distinct units, and when, on the other hand, they would be inclined to view the product as a coherent whole

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4. *See* Franklin, *When Worlds Collide: Liability Theories and Disclaimers in Defective-Product Cases*, 18 Stan. L.Rev. 974, 981-82 (1966).

for purposes of determining the nature of a plaintiff's injury. *See East River* at 2300; *Northern Power & Engineering Co.* at 330; *Walker Truck Contractors, Inc. v. Crane Carrier*, 405 F.Supp. 911, 919 (E.D. Tenn. 1975). Not surprisingly, these courts suggest that the operative distinction turns on the degree of manufacturing, marketing, and mechanical integration between the component parts. In other words, the closer the interrelationship between part and whole, measured along a number of lines, the more circumspect a court should be before accepting the argument that injury to the assembled whole caused by a defective component may constitute property damage.

In this case, even if the potatoes treated with Fusarex can be considered a "manufactured" or assembled whole, at least in the loose sense that the product consisted of constituents (the chemical sprout-suppressant and the seed potatoes) which were combined through labor at some point prior to sale to the ultimate consumer, the parts are not nearly so integrated as to militate against holding the chemical manufacturer strictly liable for plaintiffs' injury. In *East River*, the defective products were parts of gas turbine engines that powered oil-transporting supertankers. The Supreme Court observed that there was no injury other than to the gas turbines themselves. *Id.* at 2300. It seems fair to suppose that if the defective engine parts had caused injury to parts of the ship other than the engines themselves, the Court would have found damage to "other property" sufficient to ground strict liability against the manufacturer of the turbines. *See id.* This conclusion follows even though the ships could, under an alternative view, themselves be considered a manufactured whole, in which case any damage to the ships might have been viewed simply as injury to the product itself.

Hilton-Davis has not demonstrated that the chemical Fusarex

and the seed potatoes comprise an integral unit. In fact, the evidence suggests the opposite. Most significantly, the Fusarex and the seed potatoes were produced by two entirely separate entities; the Fusarex was manufactured by a chemical company and the seed potatoes were grown by a farmer in Maine. Furthermore, the application of Fusarex to seed potatoes is not a universal, nor a necessary, step in the storage of seed potatoes. Plaintiffs' expert, Dr. Dallas Batchelor, testified that farmers regularly employ natural methods to preserve the dormancy of seed potatoes. By keeping stored potatoes at a consistently cold temperature, a farmer can discourage the undesirable sprouting of seed potatoes prior to planting. In short, this is not a case where the assembled product consists of parts that inevitably and necessarily go together. A farmer intending to raise potatoes for commercial sale can buy seed potatoes in the marketplace that are not treated with Fusarex. Indeed, Washburn's "product," the chemically-treated potato, contains more discrete components than in *Walker Truck Contractors, Inc. v. Crane Carrier,* 405 F.Supp. 911, 919 (E.D. Tenn. 1975) (holding that damage to components of a truck's drive train assembly caused by defective rear-axle assemblies represented property damage, not economic loss alone).

Since the line between economic loss and property damage will not always be bright, the policies underlying products liability law should inform the contours of the boundary between tort and contract. The policy considerations behind the doctrines of warranty, strict liability and negligence support my finding that Mr. and Mrs. King have suffered an injury properly characterized as property damage. In limiting a plaintiff who suffers purely economic loss to contract/warranty remedies, courts have reasoned that tort remedies are inappropriate where the parties can bargain and assign risk effectively under the contract. *See, e.g., East River*

Steamship Corp. v. Transamerica Delaval, Inc., 106 S.Ct. 2295 (1986); *Seely v. White Motor Co.*, 63 Cal. 2d 9, 403 P.2d 145 (1965). The rationale of effective bargaining weakens when the product clearly is not an integral unit, as here where the seed potatoes would have been equally functional, as far as plaintiffs were concerned, had they not been treated with Fusarex. Under these circumstances, parties cannot be expected to bargain effectively so as to allocate all the risk.

Hilton-Davis should not be insulated from tort liability merely because the farmer who experienced the injury from the product did not himself purchase and apply the chemical suppressant, but instead happened to purchase the seed from another farmer who had done so. If plaintiffs had obtained the seed potatoes in the fall of 1982 rather than the following spring and if they had themselves decided to apply Fusarex to suppress any premature sprouting, their injury would more clearly have fallen into the property damage category. *See Streich v. Hilton-Davis*, 692 P.2d 440 (Montana 1984). Although plaintiffs in this case arguably stand one level lower on the distribution chain than the injured farmer in *Streich*, neither the farmer nor the broker with whom plaintiffs dealt can be regarded as the kind of sophisticated manufacturer or assembler whose labor has transformed constituent parts into an entirely new product, thus insulating the constituent manufacturer from strict liability.

II.

Hilton-Davis contends that the plaintiffs did not sustain their burden of proving that Fusarex was a substantial factor in causing the potato crop failure on the King farm[5] and that therefore the

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5. The measure of damages — the loss from the crop-failure — is not in dispute.

jury verdict must be reversed. However, Hilton-Davis has failed to demonstrate that the jury's verdict on causation was not supported by a sufficient quantum of evidence. To the contrary, I conclude that the evidence furnishes at least the "minimum quantum" necessary to sustain the verdict. *See Denneny v. Siegal*, 407 F.2d 433, 439 (3d Cir. 1969).

Hilton-Davis bases its objection on a hypothetical question posed to the plaintiffs' expert, Dr. Dallas Batchelor. Hilton-Davis claims that the hypothetical, which elicited Dr. Batchelor's opinion that Fusarex had inhibited the growth of the seed potatoes, rested on the improper factual premise that the only ventilation the potatoes received was the opening of the storage facility door for seven days prior to planting. While defendant Hilton-Davis correctly points out that the Kings ventilated their storage facility with an 18-inch fan, they have misconstrued the record by suggesting that Dr. Batchelor was asked to assume that the open door was the *only* source of ventilation for the seed potatoes. Before being asked to state his opinion about whether Fusarex caused the crop failure, Dr. Batchelor acknowledged that all potato storage facilities are ventilated in some manner to maintain the proper temperature and humidity regime. Thus, the hypothetical which instructed Dr. Batchelor to assume that the potatoes were ventilated by opening a door seven days prior to planting must be construed as a direction about the degree to which the seed potatoes received ventilation above and beyond the "normal" ventilation to which Dr. Batchelor had previously referred.

III.

In making its post-trial motions, Washburn Potato Company, the other defendant in this action, relies heavily on an exculpatory clause in its contract with the Kings. Having concluded that this

clause should be given effect, I will grant Washburn's motion for a judgment n.o.v.

Contract clauses which forswear the negligence liability of a contracting party are not favored under Pennsylvania law and hence are strictly construed. *Crew v. Bradstreet Co.*, 134 Pa. 161, 169, 19 A. 500 (1890); *Employers Liability Assurance Corp. v. Greenville Business Men's Association*, 423 Pa. 288, 244 A.2d 620, 623 (1966). On the other hand, Pennsylvania law affords wide latitude in allowing parties to enter into legally binding contractual arrangements, so long as these arrangements do not contravene public policy. *Gallican v. Arovitch,*, 421 Pa. 301, 304, 219 A.2d 463, 465 (1966); *Dilks v. Flohr Chevrolet, Inc.*, 411 Pa. 425, 192 A.2d 682 (1963). In particular, the Pennsylvania Supreme Court has held that exculpatory clauses eliminating a party's negligence liability are valid and enforceable if certain standards are satisfied. *Employers Liability*, 224 A.2d at 623.

First of all, the contract must not be one of adhesion. *Id.* The Washburn contract was not a contract of adhesion. The market for seed potatoes was robust enough that plaintiffs might have purchased from any number of Maine dealers. In fact, Washburn introduced into evidence two form contracts used by other Maine potato seed sellers, neither of which contains language expressly waiving the seller's negligence liability, although one contract does contain a clause purporting to limit liability in warranty. Finally, the transaction between Washburn and Naaman King, an experienced farmer who had dealt with other brokers and dealers in the past, did not involve parties of such unequal bargaining power that would suggest an adhesion contract. *See Fidelity Leasing Corp. v. Dun & Bradstreet, Inc.*, 494 F.Supp. 786, 788 (E.D. Pa. 1980) (no adhesion contract given relative bargaining equality between the parties).

Appendix C

Although the exculpatory clause of the Washburn-King contract identifies negligence liability in explicit terms, thereby satisfying the requirement that the intention of the parties be specified with the "greatest of particularity," *Employers Liability*, 224 A.2d at 623, citing *Morton v. Ambridge Borough*, 375 Pa. 630, 635, 101 A.2d 661, 663 (1954), this exculpatory language may not suffice to insulate Washburn from a claim of gross negligence. *See Fidelity Leasing*, 494 F.Supp. at 788-90. Although plaintiffs' complaint charged Washburn with gross negligence, plaintiffs have not suggested in their post-trial briefs, nor would the record justify, a finding of gross negligence against Washburn. This being so, I see no reason not to enforce the exculpatory term of the Washburn-King contract.

An Order follows.

Appendix C

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CIVIL ACTION
No. 85-877

NAAMAN E. KING and MARIAN KING

v.

HILTON-DAVIS, a/k/a HILTON-DAVIS CHEMICAL COMPANY, etc., et al.

ORDER

AND NOW, this 26th day of October, 1987, upon consideration of the motions of defendants Hilton-Davis and Washburn Potato Company for a judgment n.o.v. or, alternatively, a new trial, of Washburn Potato Company for an amendment of the judgment, and of plaintiffs for the molding of the jury verdict in accordance with Pennsylvania Rule of Civil Procedure 238, it is ORDERED:

1. That a judgment be entered in favor of Washburn Potato Company and against the plaintiffs Naaman and Marian King.

2. That Hilton-Davis' motion for judgment n.o.v. or new trial is DENIED.

3. That the jury verdict of $218,463.08 be molded to include delay damages of $21,547.04 in accordance with Pennsylvania Rule of Civil Procedure 238. Judgment shall be entered on the

verdict in favor of the plaintiffs and against Hilton-Davis in the amount of $240,010.12.

s/ John P. Fullam

Ch.J.

(2)

DEC 21 1988

JOSEPH F. SPANIOL, JR.
CLERK

NO. 88-829

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

NAAMAN E. KING and MARIAN KING,
Petitioners

vs.

HILTON-DAVIS, a/k/a HILTON-DAVIS CHEMICAL CO.,
a Division of Sterling Drug, Inc.,
Respondent

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

WHETHER THIS COURT SHOULD EXERCISE ITS DISCRETIONARY POWER OF REVIEW TO CONSIDER THE PREDICTIVE INTERPRETATION AND APPLICATION OF THE COMMON LAW OF PENNSYLVANIA BY THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

PARTIES TO THE ACTION

RESPONDENT, HILTON-DAVIS, CONCURS IN THE PETITIONERS' IDENTIFICATION OF THE PARTIES TO THIS ACTION, BUT WOULD ADD IN COMPLIANCE WITH RULE 28.1 THAT STERLING DRUG, INC., A DELAWARE CORPORATION, BECAME A WHOLLY OWNED SUBSIDIARY OF EASTMAN-KODAK IN MARCH OF 1988.

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STATEMENT OF JURISDICTION

Contrary to the assertion of the petitioners that the jurisdiction of this Honorable Court is based upon 28 U.S.C. § 2101(c), this Honorable Court's jurisdiction is actually based upon 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Hilton-Davis respectfully submits that no federal constitutional or statutory provisions are at issue in this matter. Rather, the petition before the Court calls for a discretionary consideration of what is substantively an issue of Pennsylvania common law.

Hilton-Davis frankly admits that it is at a loss to determine the application to the facts and circumstances of this matter of Amendment X to the Constitution of the United States as well as the Rules of Decision Act of 1789, 28 U.S.C. § 1652, as set forth in the Kings' Petition at page 2. Hilton-Davis would also note that neither of these provisions are referenced elsewhere in the Kings' Petition, nor have they been presented, much less argued, in the courts below.

COUNTERSTATEMENT OF THE CASE

The respondent, Hilton-Davis, incorporates as its counterstatement of the case the opinion of the United States Court of Appeals for the Third Circuit included as Appendix A to the Petition for Writ of Certiorari filed on behalf of the Kings, and reported under the caption *King v. Hilton-Davis* at 855 F.2d 1047 (3d Cir. 1988). However, the respondent would only wish to clarify that its product, Fusarex, is a sprout inhibitor rather than a sprout suppressant. The distinction between these two characterizations is that an inhibitor temporarily delays sprouting in seed

potatoes while a suppressant permanently terminates a potato's ability to sprout.

Hilton-Davis would also wish to oppose any implication in the Kings' Statement of the Case to the effect that the question resolved by the Court of Appeals was not raised before the Honorable Trial Court. To the contrary, a large portion of the Honorable District Court's opinion addresses the very issue decided by the Court of Appeals. *See King v. Hilton-Davis*, No. 85-877, slip op. at 2-7; Appendix C to the Petition for Writ of Certiorari at 21a-26a, inclusive. The respondent would also note that four issues not addressed by the Court of Appeals in its opinion or disposition of this matter have been briefed and preserved for appellate review in the event that the petitioners' Writ is granted.

SUMMARY OF THE ARGUMENT

The petitioners do not put before the Court either special and important reasons for granting this Petition, or an important question of federal law. Rather, the petitioners have misconstrued the lower court's predictive interpretation and application of Pennsylvania law as an issue calling for the discretionary review of this Court.

The Court's of Appeals interpretation and application of the substantive law is rationally based upon the well reasoned principles set forth in *East River Steamship Corp. v. Transamerica Delaval, Inc.*, 476 U.S. 858, 106 S. Ct. 2295, 90 L. Ed. 2d 865 (1986), *Aloe Coal Co. v. Clark Equipment Co.*, 816 F.2d 110 (3d Cir. 1987), *cert. denied*, ___ U.S. ___, 108 S. Ct. 156, 98 L. Ed. 2d 111 (1987), and *Shipco 2295, Inc. v. Avondale Shipyards, Inc.*, 825 F.2d 925 (5th Cir. 1987), *cert. denied*, ___U.S. ___, 108 S. Ct. 1472, 99 L. Ed. 701 (1988). Further, the lower court's reasoning is authoritative in the absence of a decision on the pertinent issue by the Supreme Court of Pennsylvania.

ARGUMENT

The petitioners expressly invoke the discretionary power of review of this Honorable Court as described in Rule of the Supreme Court of the United States 17.1(c). Petition at 13. As this Honorable Court is no doubt well aware, that Rule provides:

> **Rule 17. Considerations Governing Review on Certiorari.**
>
> 1. A review on writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only when there are special and important reasons therefor. The following, while neither controlling nor fully measuring the Court's discretion, indicate the character of reasons that will be considered.
>
> . . . .
>
> (c) When a state court or a federal court of appeals has decided an important question of *federal* law which has not been, but should be, settled by this Court, or has decided a *federal* question in a way in conflict with applicable decisions of this Court.

(Emphasis added.)

Petitioners have presented this matter as a direct application of this Honorable Court's decision in the case of *East River Steamship Corp. v. Transamerica Delaval, Inc.*, 476 U.S. 858, 106 S. Ct. 2295, 90 L. Ed. 2d 865 (1986). However, unlike *East River, supra,* which involved the resolution of a conflict among the courts of appeals sitting in admiralty,[1] the case presently before the Court entails neither special and important reasons for granting this petition, nor an important question of federal law. Rather, this matter

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1. *East River Steamship Corp. v. Transamerica Delaval, Inc.*, 476 U.S. 858, ___, 106 S. Ct. 2295, 2298, 90 L. Ed. 2d 865 (1986). *See, e.g., Executive Jet Aviation, Inc. v. City of Cleveland*, 409 U.S. 249, 93 S. Ct. 493, 34 L. Ed. 2d 454 (1972).

involves Pennsylvania's common law of negligence, strict liability and warranty as predictively interpreted and applied by a federal court sitting in diversity. *King v. Hilton-Davis*, 855 F.2d 1047 (3d Cir. 1988) [Appendix A to the Petition]; *King v. Hilton-Davis*, No. 85-877, slip op. (E.D. Pa. Oct. 26, 1987) [Appendix C to the Petition]. Therefore, this matter falls into that category of cases in which this Honorable Court defers to lower federal courts on state-law issues. *E.g.*, *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 500, 105 S. Ct. 2794, 2800, 86 L. Ed. 2d 394 (1985); *Butner v. United States*, 440 U.S. 48, 58, 99 S. Ct. 914, 919, 59 L. Ed. 2d 136 (1979); *Cort v. Ash*, 422 U.S. 66, 72 n.6, 95 S. Ct. 2080, 2085 n.6, 45 L. Ed. 2d 26 (1975).

Indeed, scrutiny of most of the cases which the petitioners cite throughout their argument reveals the application of the substantive law of the various states, rather than important questions of federal law. Those cases, in the order set forth by petitioners, apply the substantive law of the following jurisdictions: *Aloe Coal Co. v. Clark Equipment Co.*, 816 F.2d 110 (3d Cir. 1987), *cert. denied*, __ U.S. __, 108 S. Ct. 156, 98 L. Ed. 2d 111 (1987), Pennsylvania law; *Valley Farmers' Elevator v. Lindsay Bros. Co.*, 398 N.W.2d 553 (1987), Minnesota law; *Cincinnati Gas & Electric Co. v. General Electric Co.*, 656 F. Supp. 49 (S.D. Ohio 1986), Ohio law; *Anderson Electric Inc. v. Ledbetter Erection Corp.*, 115 Ill. 2d 146, 503 N.E.2d 246 (1986), Illinois law; *Streiff Jewelry Co. v. United Parcel Service, Inc.*, 670 F. Supp. 341 (S.D. Fla. 1987), Florida law; *Flow Industries v. Fields*, 683 F. Supp. 527 (D. Md. 1988), Maryland law; *Wood Products, Inc. v. CMI Corp.*, 651 F. Supp. 641 (D. Md. 1986), Maryland law; *Bancorp Leasing & Financing Corp. v. Augusta Aviation Corp.*, 813 F.2d 272 (9th Cir. 1987), Oregon law; *Richard O'Brien Companies v. Challenge-Cook Bros.*, 672 F. Supp. 466 (D. Colo. 1987), Colorado law; *Held v. Mitsubishi Aircraft International, Inc.*, 672 F. Supp. 369 (D. Minn. 1987), Texas law; *Frey Dairy v. A.O. Smith Harvestore Products, Inc.*, 680 F. Supp. 253 (E.D. Mich. 1988), Michigan law;

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The only exception to the petitioners' application of state law lies in those cases cited by petitioners which rely upon maritime or admiralty law and, therefore, are directly controlled by *East River Steamship Corp., supra.*[2] There is no dispute but that this is not an admiralty or maritime case. The Honorable District Court and Court of Appeals applied their respective predictions of the law of the Commonwealth of Pennsylvania. Slip op. at 3 n.3 [Appendix C at 22a]; 855 F.2d 1017 at 1048 [Appendix A at 3a]. Petitioners do not now argue, nor have they ever argued, that the application of Pennsylvania law to this matter is improper.

Accordingly, it is not the law as announced by the Court in *East River Steamship Corp.*, which applies to this case, but that prediction of Pennsylvania law made by the Court of Appeals for the Third Circuit in *Aloe Coal Co. v. Clark Equipment Co., supra*, and applied by that same court to the facts and circumstances of this case. *East River* is only implicated to the extent that the court in *Aloe Coal* incorporated the principles discussed in *East River* into its prediction of future action by the Pennsylvania Supreme Court.

Wholly apart from the petitioners' failure to clearly define the applicable federal law in this instance is their

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2. *Ingram River Equipment, Inc. v. Pott Industries, Inc.*, 816 F.2d 1231 (8th Cir. 1987); *Gulf Boat Marine Services v. George Engine Co.*, 659 F. Supp. 6 (E.D. La. 1986); and *Ziddell, Inc. v. Cargo, Freight & Subfreight of Barge ZPC 404*, 661 F. Supp. 960 (W.D. Wash. 1987).

confusion of the basic substantive issue which they seek to put before the Court. Petitioners would have this Court review this matter and state that the fact finder, in this instance a jury, must decide "whether or not a defective product is a component part of a damaged product, thereby defining the buyer's available remedies in tort or warranty under *East River Steamship Corp. v. Transamerica Delaval, Inc.*, and its progeny." Petition at 12.

In *East River Steamship Corp., supra,* this Court set down the rule in admiralty cases that there is no recovery for economic losses in tort, and that damage to a product itself is such an economic loss. The United States Court of Appeals for the Third Circuit adopted the *East River* analysis in its predictive role of interpreting and applying the common law of Pennsylvania in the case of *Aloe Coal Co. v. Clark Equipment Co., supra.* The case at bar merely represents an application of those principles of *East River* and *Aloe Coal* in a different factual context:

> In *Aloe Coal,* we predicted that the Supreme Court of Pennsylvania would decline to follow a course that would severely restrict the ability of parties in commercial transactions to allocate the risk of purely economic losses and would leave a manufacturer with an open-ended and indefinite liability for such losses. The only factual difference between *Aloe Coal* and this case is that the plaintiff in *Aloe Coal* was attempting to recover economic loss from a manufacturer from whom it purchased directly, while the plaintiff here seeks to recover such loss from a component supplier who was remote from the plaintiff in the production and distribution chain. While we find a portion of the relevant Pennsylvania law uncertain, given the policy judgments we have predicted the Pennsylvania Supreme Court would adopt, we conclude that this factual distinction would not produce a different result.

King v. Hilton-Davis, 855 F.2d at 1053 [Appendix A at 13a-14a].

At present, there is no final word on the substantive legal issue addressed by the court below from the Pennsylvania Supreme Court which, of course, is the ultimate authority on Pennsylvania common law. In the absence of such a controlling precedent, the Court of Appeals for the Third Circuit has rationally predicted that which such a precedent from the Pennsylvania Supreme Court would state by applying the principles enunciated by this Court in *East River*.[3] Neither the petitioners in this case, nor in *Aloe Coal*, have stated legitimate grounds necessitating discretionary review by the Court.[4]

---

3. The court concluded that there is no question that the Kings bargained for Fusarex-treated potatoes as opposed to potatoes, or Fusarex standing alone. *King v. Hilton-Davis*, 855 F.2d at 1053 n.4 [Appendix A at 13a n.4]. In view of this, the court determined that the Kings lost the expected performance of the seed potatoes, a conclusion borne out by the claimed loss of the crop rather than the value of the seed potatoes themselves. *See* 855 F.2d at 1052 [Appendix A at 12a]. Indeed, the court likened the Fusarex on the seed potatoes to a component in a machine thereby confirming the nonrecoverability in tort of the economic loss. 855 F.2d at 1052 [Appendix A at 12a], *citing*, *Shipco 2295, Inc. v. Avondale Shipyards, Inc.*, 825 F.2d 925 (5th Cir. 1987), *cert. denied*, ___ U.S. ___, 108 S. Ct. 1472, 99 L. Ed. 2d 701 (1988). Thus, the remedy for the petitioners lay in the warranty action which they permitted to slip from their grasp. 855 F.2d at 1049 [Appendix A at 5a]; *Aloe Coal Co. v. Clark Equipment Co.*, 816 F.2d at 117-18. *See King*, *supra* at 1049 n.1 [Appendix A at 6a n.1].

4. As in the *Aloe Coal* case, a grant of certiorari on the facts and circumstances of this case would effectively place this Court in the position of reviewing the substantive law of each and every jurisdiction in the United States which has not dispositively ruled upon a given issue.

CONCLUSION

Petitioners, contrary to their express assertions, have failed to set before this Honorable Court either an important question of federal law, or a federal question decided in a manner which conflicts with applicable decisions of this Court. This case involves the interpretation and application of the common law of Pennsylvania by federal courts sitting in that Commonwealth and there are no special and important reasons necessitating review by this Court. The Court of Appeals properly applied the principles enunciated by this Court in *East River Steamship Corp. v. Transamerica Delaval, Inc., supra,* and incorporated by *Aloe Coal Co. v. Clark Equipment Co., supra,* to correct the error of the Honorable District Court. Respondent requests that this Court deny the petition for Writ of Certiorari.

Respectfully submitted,

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a Division of Sterling Drug, Inc.

88-829
No.

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1988

NAAMAN E. KING and MARIAN KING,

Petitioners,

vs.

HILTON-DAVIS, a/k/a HILTON-DAVIS CHEMICAL CO., a Division of Sterling Drug, Inc.,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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No.

In The

Supreme Court of the United States

October Term, 1988

NAAMAN E. KING and MARIAN KING,

Petitioners,

vs.

HILTON-DAVIS, a/k/a HILTON-DAVIS CHEMICAL CO., a Division of Sterling Drug, Inc.,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

REPLY BRIEF FOR PETITIONERS

STATEMENT OF JURISDICTION

This Court's substantive jurisdiction is based upon 28 U.S.C. § 1254(1) as the petition for the writ of certiorari intended to bring before the Court a judgment in a civil action rendered by the United States Court of Appeals for the Third Circuit. This

Court's procedural jurisdiction is based upon 28 U.S.C. § 2101(c) as the petition for writ of certiorari was applied for within ninety (90) days after the entry of the Third Circuit Court's judgment in this matter.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Amendment X to the Constitution of the United States and the Rules of Decision Act of 1789, 28 U.S.C. § 1652 are the pertinent constitutional and statutory provisions in this diversity case. The law to be applied is that of the state. The United States Court of Appeals for the Third Circuit has predicted that Pennsylvania would adopt the federal common law principles enunciated in *East River S.S. Corp. v. Transamerica Delaval, Inc.*, 476 U.S. 858, 106 S. Ct. 2295, 90 L. Ed. 2d 865 (1986). Since the Pennsylvania Supreme Court has not yet decided any cases under the rule of *East River*, nor has it rejected that formulation of the law, the prediction by the Court of Appeals of state law governs the instant matter. The law to be applied has never been a contested issue, and petitioners assume that respondent is not now arguing the point.

ARGUMENT

THE PETITION FOR WRIT OF CERTIORARI RAISES THE IMPORTANT QUESTION OF INTERPRETATION OF FEDERAL COMMON LAW WHICH HAS BEEN ADOPTED AS THE LAW OF THE STATE IN THIS DIVERSITY ACTION.

Rule 17 of the Supreme Court Rules expressly recognizes that no list can encompass every special and important reason justifying the exercise of this Honorable Court's powers of review. The specific categories set forth in subsections (a)-(c) are illustrative, not exclusive.

The instant matter presents an unusual question, of broad applicability, which may not fit precisely within the categories of Rule 17 but shares their character. Subsection (c), in particular, provides that review is warranted "when a federal court of appeals has decided an important question of federal law which has not been but should be, settled by this Court." In this diversity case, the lower court technically rendered its decision based on state law, but in fact applied the federal common law of *East River S.S. Corp. v. Transamerica Delaval, Inc.*, 476 U.S. 858, 106 S. Ct. 2295, 90 L. Ed. 2d 865 (1986).

In the case of *Aloe Coal Co. v. Clark Equipment Co.*, 816 F.2d 110, *cert. denied*, ____ U.S. ____, 108 S. Ct. 156, 98 L. Ed. 2d 111 (1987), the United States Court of Appeals for the Third Circuit predicted that the Pennsylvania Supreme Court would abandon current state law concerning recovery in tort for economic losses resulting from damage caused by a product to itself, and adopt the law announced by this Court in *East River*. The state Supreme Court has not yet addressed the issue. Therefore, where the tort/warranty issues of *East River* are raised in Pennsylvania's federal courts, "state law" is, in substance, federal common law.

Recovery in tort continues to be available for property losses resulting from damage caused by another product, but not the "product itself." Therefore, correct resolution of such claims is absolutely dependent on the proper threshold analysis of the nature of the subject property. Petitioners respectfully submit that the Court of Appeals erred in its analysis of this exceptionally significant issue, and in failing to identify the question as one of fact to be resolved by a fact finder, not an appellate court. These important questions have not been, but ought to be, decided by this Court. They build upon, and constitute necessary development of, the law announced by this Court in *East River*, not only predicted to be Pennsylvania law but adopted as the

law of virtually all of the state and federal courts which have considered it.

It is not merely the black letter holding of *East River* which has been followed by state and federal courts alike. The thorough and cogent reasoning of this Court, addressing the underlying policy considerations of risk allocation in tort and warranty, persuasively commended adoption of the law. The courts have looked to this Court for direction, and accepted its authoritative formulation. The petition for writ of certiorari should be granted because only this Court can, as it did in *East River*, properly provide to these lower courts the appropriate conceptualization of the issues and interests at stake here and in property damage cases across the nation.

It is not controverted that the Third Circuit sought to apply *East River*. There is no other "Pennsylvania law" upon which this case was decided. The lower court, however, misapprehended the critical inquiry into the relationship between the defective and damaged properties. The question presented should be reviewed by this Court, as a further clarification of the availability of the remedies of tort and warranty for property damage under the law and policy of *East River*, whether applied directly as federal common law or as the adopted law of the several states.

Respectfully submitted,

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